SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 439.

ERIE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

ALBERT L. PURDY, DEFENDANT IN ERROR.

BRIEF OF PLAINTIFF IN ERROR IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

Error to Supreme Court of New York.

STATEMENT.

This case comes to this Court upon a writ of error to the Supreme Court of the State of New York, from the judgment of that Court, making the judgment of the Court of Appeals of that State the judgment of said Court, thereby affirming an order and judgment of the Appellate Division of the Supreme Court for the Fourth Department, which overruled the exceptions of said Erie Railroad Company and ordered judgment against it, which judgment was thereupon entered in the clerk's office of the County of Allegany on the 17th day of October, 1898, for $523.58 damages and interest, and $537.51 costs, to which was added $134.69 costs on the appeal to the Court of Appeals by the judgment entered on the remittitur of that Court March 6th, 1900. (Record, p. 104, fols. 210–211; p. 107, fol. 217; pp. 108–109, fols. 220–222; p. 112, fols. 228–229.)

The judgment is for ten penalties of $50 each, in ten actions, afterwards consolidated, such penalties being based upon the refusal of the Erie Railroad Company to comply with ten written demands

of Albert L. Purdy that the Erie Railroad Company deliver to him a "mileage book entitling the holder thereof to travel 1,000 miles "on the line or lines of your road, required to be issued by you "under Chapter 1027 of the Laws of 1895, as amended by Chapter "835 of the Laws of 1896, of the State of New York." (Record, p. 71, fol. 147.)

These demands were made June 26, 1896, June 29, 1896, July 1, 1896, July 3, 1896, July 10, 1896, July 12, 1896, July 15, 1896, August 22, 1896, August 25, 1896, August 27, 1896, and all these demands were made after Chapter 835 of the Laws of 1896 had become the only statute on the subject that was enforceable. Upon these demands the ten separate actions, afterwards consolidated, upon which the judgment in question is based, were brought June 29, 1896, June 30, 1896, July 2, 1896, July 7, 1896, July 13, 1896, August 13, 1896, August 17, 1896, August 24, 1896, August 26, 1896, August 28, 1896. (Record pp. 71–77, fol. 159.)

None of these written demands were limited to the line or lines of the Erie Railroad Company within the State of New York, but each of these written demands were for "a mileage book * * * to travel 1,000 miles on the line or lines of your road." (Record, p. 71, fol. 147; p. 72, fols. 149–150; p. 73, fol. 152; p. 74, fol. 154; p. 75, fols. 155; p. 76, fols. 156, 157, 158; p. 77, fol. 158.)

These demands followed the language of the statute, and some of them contained the substance if not the express words of the statute, by which the holder of the mileage book would be entitled "to the same rights and privileges to which the highest class ticket "issued by you would entitle such holder, such mileage book to be "good until all coupons attached thereto are used." (Record, p. 74, "fol. 154.

Those demands that did not expressly incorporate this language into them did do so in effect by requiring the Erie Railroad Company to issue the mileage books "required to be issued by you under "Chapter 1027 of the Laws of 1895 as amended by Chapter 835 of "the laws of 1896." (Record, p. 71, fol. 147 to p. 77, fol. 159.)

This is so because the act of 1896 adds the following words, among others: "The holder of any such mileage book shall be "entitled, upon surrendering, at any ticket office on the line or lines "of such railroad, coupons equal in number to the number of miles "which he or any member of his family, or firm, or a salesman "of such firm, wishes to travel on the *line or lines of such railroad*, to

"a mileage exchange ticket therefor. Such mileage exchange "ticket shall entitle the holder thereof without producing the "mileage book upon which such exchange ticket was issued, *to the "same rights and privileges* in respect to the transportation of person "and property *to which the highest class ticket issued* by such corpora- "tion would entitle him. Such mileage books shall be good until "all the coupons attached thereto have been used." This is all entirely new and a very onerous provision. (This was overlooked by the Court below.)

At the time Albert L. Purdy demanded these various mileage books of the Erie Railroad Company, he made no different demand, and it was conceded by his counsel on the trial, and understood by the Court, that Purdy must stand or fall upon these demands alone. (Record, pp. 98 and 99, fol. 200.)

As a part of the cross-examination of Purdy, it was shown by the deed of Charles H. Coster to the Erie Railroad Company delivered and recorded in November, 1895, and by the map put in evidence, that the continuous "line or lines" of said Erie Railroad Company, as operated by it, extended from Jersey City, in the State of New Jersey, through the States of New Jersey, Pennsylvania, New York, Ohio, Indiana, Illinois, to the City of Chicago. (Record, p. 99, fol. 201; map between pp. 110 and 111.

It is undisputed that a first-class ticket for a thousand miles would entitle the holder thereof to a continuous passage through these various States for one thousand miles, from any point at which the ticket might be purchased to the point of destination, and under the Act in question, and the demand of Purdy, the Erie Railroad Company, if it complied therewith, would be required to deliver to Purdy a mileage book which he could use to go from the point where he made the demand, Wellsville, N. Y., through the State of Pennsylvania and the State of New Jersey, to New York City, or from Wellsville westward through the various States traversed by the Erie Railroad Company to Chicago, as Wellsville is not a thousand miles from either New York or Chicago, and it would be optional with the plaintiff whether he would use such mileage book for a continuous passage along the line or lines of the Erie Railroad Company to New York or to Chicago.

The complaints in the first ten actions in which the judgment has been rendered are based upon these written demands and the statute specified in them, and seek to recover a penalty of fifty

dollars for the violation of the statute, in that the Erie Railroad Company failed to comply with Purdy's demand. (Record, pp. 4 to 24 inclusive).

Albert L. Purdy is a lawyer and former police justice living in Wellsville, and he continued the business of making demands and bringing actions until he had brought nineteen separate actions in the Supreme Court and two separate actions in the Court of a Justice of the Peace. (Record, pp. 25 to 48 inclusive).

The Court non-suited Purdy in the last eleven actions brought by him, because the Erie Railroad Company tendered him a book good within the State of New York, and subject to certain rules and regulations. (Record, p. 77, fol. 159; mileage book, pp. 78, 79, 80 and 81; also testimony, pp. 81 to 89; non-suit, p. 103, fol. 209).

The answers of the Erie Railroad Company in these actions are the same, as to the points involved in this Court. Those answers begin:

"The above named defendant, not waiving but insisting that "the complaint herein does not state facts sufficient to constitute a "cause of action against it, by Sprague, Moot, Sprague & Brownell, "its attorneys, answers said complaint as follows."

The answer then sets up various defenses, the substance of which is that the legislation in question does not apply to the Erie Railroad Company, and then it contains this paragraph:

"Sixth. It alleges that the line of the railroad owned and "operated by it extends from Jersey City in the State of New Jersey, "through the States of New Jersey, Pennsylvania and New York, "and in the State of New York connects with lines of railroad "leased by it, and operated and substantially owned by it, over "which it transports persons and property to Chicago, with numer-"ous lateral branches extending from the State of New York to "different States. And it alleges upon information and belief, that "the said act known as Chapter 835 of the Laws of 1896, is uncon-"stitutional and void, because it is in violation of the provision of "the Constitution of the United States which commits to Congress "the sole power to regulate commerce between the several States, "*and that it is unconstitutional and void because it is in violation of* "*various other provisions of the Constitution of the United States*, and of "the Constitution of the State of New York." (Record, pp. 49-50, fols. 102-103.) It will be seen these last words add another ground of defense common to both State and United States Constitutions;

and the only one that could have been so referred to was N. Y. Const., Art. VI, § 1 and U. S. Const., Art. XIV, § 1.

The remaining answers likewise insist upon the legal defense that the complaint does not state a cause of action, and plead the same defense of the unconstitutionality of the legislation in question under both the State and United States Constitutions. (Record, pp. 50 to 53).

The various actions were consolidated without prejudice to the rights of the parties thereto. (Record, pp. 61 to 69).

At the very beginning of the trial, a motion was made "to dis-"miss each of the actions consolidated in this action upon the "ground that the complaint in each of the actions fails to state facts "sufficient to constitute a cause of action for a penalty." (Record, p. 65, fol. 134).

The record does not show the argument urged in support of this motion, but it does disclose the exception to the refusal of the Court to grant it, and it does not disclose anything to show that the constitutional claim made in the answer was not urged upon the Court in behalf of the Erie Railroad Company from every possible point of view. There is nothing in the record to show that the claim that the legislation was unconstitutional, made in behalf of the Erie Railroad Company in the answer filed, was ever waived, or that it was not always insisted upon in every Court, everywhere.

The plaintiff, Purdy, offered in evidence the certificate of incorporation of the Erie Railroad Company filed November 14th, 1895, but it was not claimed that there was anything therein, or any provision of law in the State of New York, that would make the filing of such a certificate of incorporation a waiver of any constitutional or statutory right that the Erie Railroad Company might have to charge three cents a mile for the carriage of passengers. (Record, p. 65, fol. 135).

On the contrary, every complaint of Albert L. Purdy expressly alleges that the Erie Railroad Company "is authorized by law to "charge a maximum fare of more than two cents per mile and not "more than three cents per mile, to-wit: three cents per mile, and "which it does charge and did charge at the time herein set forth "* * * for the transportation of passengers." (Record, p. 4, fol. 8, etc).

Upon this point, the railroad statute of the State of New York provides:

"Every railway corporation may fix and collect the following "rates of fare as compensation to be paid for transporting any pas-"senger and his baggage * * * for each mile or fraction of a "mile." (Here certain railroads are excepted which a stipulation made on the trial showed did not apply to the Erie Railroad Company. (Record, pp. 65, 66 and 70, fols. 135 and 145.)

"5. In all other cases, three cents for every such mile or fraction "thereof." (Chap. 676, Laws 1892, § 37, pp. 1392-3.)

The mileage law therefore arbitrarily deprived us of one-third of our income for all persons able to buy transportation wholesale.

At the end of the trial, counsel for the Erie Railroad Company moved for a nonsuit in each action separately; first, upon the ground that the cause of action alleged in each complaint has not been proved; second, upon the ground that no cause of action has been proved in either of the actions consolidated in the action on trial. (Record, p. 102, fol. 207.)

The Court denied this motion as to the first ten cases, and an exception was noted to the denial of this motion. (Record, p. 103, fol. 209.)

The Court refused to direct a verdict in favor of the defendant, the Erie Railroad Company, as to the first ten cases, but did direct a verdict in favor of the plaintiff, Albert L. Purdy, as to the first ten cases, and an exception to this ruling was duly entered in favor of the Erie Railroad Company. (Record, pp. 103-104, fol. 210.)

An appeal was not taken to the Appellate Division of the Supreme Court, but the Court ordered these exceptions heard in that Court in the first instance. (Record, p. 104, fol. 210; p. 105, fol. 212.)

That Court denied the motion in behalf of the Erie Railroad Company for a new trial upon such exceptions, and ordered judgment in favor of Albert L. Purdy. (Record, p. 108, fol. 220, etc.)

No opinion was written by the Trial Court, or at the Appellate Division. (Record, p. 107, fol. 208; p. 108, fol. 219.)

Accordingly, the defendant, in accordance with long established practice, took an appeal to the Court of Appeals, in the usual form, to test the constitutionality of the statutes involved. (Record, p. 110, fol. 223.)

The Court of Appeals "considered that said judgment be in all "things affirmed, with costs as aforesaid, and stand in full force, "strength and effect," thereby necessarily determining that the

statutes in question are constitutional and enforceable as to the Erie Railroad Company. (Record, p. 111, fols. 226-227.)

OPINIONS OF COURT OF APPEALS.

The opinion of Cullen, J., in the Court of Appeals, shows in substance that, on the merits, he thought the Erie Railroad Company *estopped* from availing itself of its plea that the statute is unconstitutional. His reason was the filing of the certificate of incorporation of the Erie Railroad Company November 14, 1895, after the statute of 1895 took effect, but before the statute of 1896 took effect. He made the mistake of thinking the statute of 1896 one making changes alone favorable to railroads; otherwise he admits the railroad was entitled to succeed. He did not see that the judgment in effect necessarily compels the railroad company to make contracts (issue 1000 mile books), good forever, on which any holder can get an exchange ticket good for 1000 miles on the "line or lines" of the railroad company, no matter in what State that "line or lines" may be located; hence that question is not discussed in what is said of the interstate commerce constitutional question. He expresses a mere "doubt" as to whether one constitutional question was in fact raised below; after he has first discussed that question on the merits for some pages, and then decided it. The very case he cites as authority for his doubt, on examination admits the legal principle that should have removed this legal "doubt." The opinion nowhere considers whether the railroad company should be *estopped* from defeating the enforcement of an unconstitutional law at the suit of a "professional" for mere penalties; even if there may be cases where the *State* could insist upon an estoppel for well known equitable reasons. No case is cited where, as here, the principle of estoppel has been applied to a constitutional defense in a mere private suit of a person for penalties where there is no consideration, or evidence on which to rest such estoppel.

The far reaching and disastrous consequences of a doctrine which admits a statute is unconstitutional, yet permits a mere informer to enforce it for his private gain in penalties, contrary to the very constitution of the United States, which is the supreme law of the land, are not even referred to or in any way considered. Judging from the expressions of one of the Court of Appeals in the Beardsley

case, 162 N Y., 230, involving the statute of 1895 alone (which was admitted to be unconstitutional only because this court so held in Lake Shore vs. Smith, 173 U. S., 684,) the Court of Appeals failed to grasp the true import of the great questions of liberty of contract and equal rights and protection to all in person and property involved in litigations of this character.

ASSIGNMENTS OF ERROR.

The assignments of error are as follows, (Record, pp. 120–122):

"1. That the Supreme Court of the State of New York erred and "violated Article XIV. of the Constitution of these United States "in holding and determining that Chapter 1027 of the laws of the "State of New York for the year 1895, as amended by Chapter 835 "of the laws of the State of New York for the year 1896, entitled, "'An act in relation to the issue of mileage books by railroad "corporations,' did not and does not violate the provisions of "Article XIV., Subdivision 1, of the Constitution of the United "States, and in holding and determining that by the refusal of the "plaintiff in error to issue mileage books to the defendant in error "under said statute the plaintiff in error has forfeited ten separate "penalties of fifty dollars ($50) each to the defendant in error, and "the defendant in error is entitled to recover judgment therefor "against the plaintiff in error.

"2. That the Supreme Court of the State of New York erred and "violated Article I. of the Constitution of these United States in "holding and determining that Chapter 1027 of the laws of the "State of New York for the year 1895, as amended by Chapter 835 "of the laws of the State of New York for the year 1896, entitled, "'An act in relation to the issue of mileage books by railroad "corporations,' did not and does not violate the provisions of "Article I. of the Constitution of the United States, and in holding "and determining that by the refusal of the plaintiff in error to "issue mileage books to the defendant in error under said statute "the plaintiff in error has forfeited ten separate penalties of fifty "dollars ($50) each to the defendant in error, and the defendant in "error is entitled to recover judgment therefor against the plaintiff "in error.

"That the judgment of the Supreme Court of the State of New "York wherein the Supreme Court of the State of New York "erred and violated Article I. of the Constitution of these United "States and Article XIV., Subdivision 1, of the Constitution of "these United States, as aforesaid, was entered in the clerk's office "of the Supreme Court of the State of New York, in and for the "County of Allegany, on the 17th day of October, 1898, and "said judgment adjudged that said plaintiff in error, said Erie "Railroad Company, should pay to say defendant in error, said "Albert L. Purdy, ten separate penalties of fifty dollars ($50) "each for the violation of the statutes aforesaid; that said last-"named judgment rendered in the Supreme Court of the State of "New York, was duly affirmed by the Court of Appeals of said "State, it being the highest court of law and equity in said State in "which a decision could be had in said cause; that said judgment "should be reversed for the reasons following, namely:

"That the said judgment of the Supreme Court of the State of "New York is repugnant to Article I. of the Constitution of the "United States, which provides that 'the Congress shall have "power * * * to regulate commerce * * * among the "several States;' that the said judgment of the Supreme Court of "said State is also repugnant to Article XIV. of the Constitution of "the United States, which provides that no State shall 'deprive "any person of life, liberty or property without due process of law, "nor deny to any person within its jurisdiction the equal protection "of the laws.'

"There is error also in this, to wit: That by the record afore-"said it appears that the judgment aforesaid was given for the said "Albert L. Purdy against the said Erie Railroad Company, "whereas by the law of the land the said judgment ought to have "been given for the said Erie Railroad Company against the said "Albert L. Purdy; and the said Erie Railroad Company prays "that the judgment aforesaid, for the errors aforesaid and other "errors in the record and proceedings and the matters herein set "forth in said cause may be reversed and held for nothing, and "that said Erie Railroad Company may be restored to all things "which it may have lost by occasion of said judgment."

POINTS AND ARGUMENT.

I.

The motion of Albert L. Purdy, defendant in error, to dismiss or affirm, should be denied, because Federal questions are involved that are not "frivolous."

As I understand Rule 6 of this Court, under which this motion is made, that rule does not contemplate forcing counsel and clients to submit their cases without oral argument. If there is room for honest debate as to whether or not this Court has jurisdiction, and whether or not the Courts below have correctly determined the questions involved, the writ of error will not be dismissed. If it is reasonably clear that this Court has not jurisdiction, or that there is no merit in the question involved, then the Court should dismiss and will dismiss. In cases where this Court has already passed on the same question in the same litigation, and the State Courts have followed it, an attempt to obtain a further review by this Court would be a mere attempt to obtain delay, and in such cases this Court will dismiss the writ of error on motion.

So, too, where it is equally clear that the record does not present a Federal question, this Court should dismiss on motion. The cases sustain this position.

In The 'S. C. Tryon,' 105 U. S., 267, 270, Chief Justice Waite, in writing the opinion, in two sentences shows such considerations to be the turning point of motions like this. He says:

"The motion to dismiss must, therefore, be overruled, but on "looking into the record we are satisfied the appeal *was taken for* "*delay*. The only question presented arises on the findings of "fact."

So, in *Foster vs. Kansas*, 112 *U. S.*, 201, Chief Justice Waite, in disposing of a similar motion under Rule 6, said (p. 206):

"As the question of the constitutionality of the statute was "directly raised by the defendant, and decided against him by the "Court, we have jurisdiction, and the motion to dismiss must be "overruled: but, as every one of the questions which we are asked "to consider has been already settled in this Court, the motion to "affirm is granted."

Apply these principles here. At least one of the questions involved has been decided against the plaintiff in error, the Erie Railroad Company, by the State Courts, on its merits, but this Court has determined that question in favor of the plaintiff in error. As to that question, the statement of facts is itself an argument in favor of the plaintiff in error. Surely, without any evidence whatever that the plaintiff in error waived any of its constitutional rights by merely filing a certificate of incorporation, the plaintiff in error should not be estopped from questioning the constitutionality of an Act afterwards passed, when that Act is the only Act on which the defendant in error brought his action, or can sustain his recovery.

So, too, plaintiff in error should not be compelled to pay penalties for the mere refusal to deliver thousand mile tickets giving the holder thereof all the rights of a first-class passenger over its "line or lines." To order the plaintiff in error to pay judgments on such written demands, under such statutes, whatever may be said about the statutes and the opinions, is really to award a judgment in favor of the defendant in error under which he will be entitled to compel the plaintiff in error to issue mileage books for one thousand miles good for a first-class ticket over their "line or lines."

In addition to this, a bare inspection of the statutes involved shows the latter statute to be more onerous than the earlier one, and to be a complete "annihilation" of the first one. The learned Court of Appeals entirely overlooked its own decisions and the effect of this statute, in reaching a different conclusion.

This is enough and is an answer to this motion unless this Court cares to consider the merits of this case. If it does then we submit.

II.

The constitutionality of the statutes under the United States as well as the State constitution was put in question by every answer filed by the Erie Railroad Company, by proper motions and exceptions at the trial, and by proper notices of motion and notices of appeal, and the Court of Appeals having passed upon those constitutional questions upon the merits, and determined such questions adversely to the contention of the plaintiff in error, it is

too late for the defendant in error to deny that those questions have been brought to this Court for review.

Under the loose system of pleading now existing in New York and other Code States, it is enough if the Court on reading the pleading can fairly say what the party pleading claims to be a cause of action or a defense. Where the pleading deals with facts, it is more necessary that it should go into detail than it is where it deals with legal questions; consequently, if the defendant claims statutes to be unconstitutional in a case like this, it is enough that he demur on the broad ground that the complaint "does not state facts sufficient to constitute a cause of action." In the very nature of things, therefore, the plaintiff assumes the affirmative and necessarily pleads with more detail, while the defendant simply stands on the defensive, and may often rely upon the most simple denial or question of the plaintiff's rights.

The Code also goes farther and permits all the separate defenses to be inserted, whether legal or equitable in character, and whether consistent or inconsistent with each other. This being so, the defendant sued upon statutes for penalties may demur, or, as here, he may stand out, insisting on his first defense "that the complaint states no cause of action." This position of the defendant is alone sufficient to put in question the constitutionality of statutes on which the plaintiff relies, without alleging their unconstitutionality in set words.

In the Beardsley case (162 N. Y., 230), an examination of the record will show a demurrer on the ground that the complaint stated no cause of action was overruled; that the case was tried before the Court without a jury, and the Court ordered judgment for the plaintiff; that the defendant excepted thereto and took an appeal, and yet the Court of Appeals suggested no doubt about the constitutional question being up in that case, because on that record there could be no doubt, under the practice in New York, that the validity of the statute of 1895 was necessarily involved in the judgment based upon it.

The defendant in error says in his brief:

"The claim or allegation in the answer that the Act in question "is void because it is in violation of various other provisions of the "Constitution of the United States, is too indefinite to be considered." (Brief, p. 5.)

To sustain this statement, he cites *Maxwell vs. Newbold*, 59 *U. S.* 511, and *Messenger vs. Mason*, 77 *U. S.*, 507.

An examination of those cases shows very clearly that they are not in point.

Maxwell vs. Newbold is not a case dealing with an answer under the Code system of pleading. That case does not deal with an answer at all. That case does not consider the effect of the motions made and the exceptions taken at the trial in this case. That case is an authority for us, because it distinctly holds that constitutional questions raised and determined by the highest Court of the State can be reviewed by this Court on writ of error. That case was dealing with errors assigned, and it held one of them to be "too general and indefinite," but the Judge distinctly said :

"The questions raised and decided in the State Circuit Court point "altogether for their solution to the laws of the State, *and make no* "*reference whatever to the Constitution or laws of the United States.* Un- "doubtedly this did not preclude plaintiffs in error from raising the "point in the Supreme Court of the State, if it was involved in the "case as presented to that Court. And whether a writ of error "from this Court will lie or not depends upon the questions raised "and decided in that Court" (the highest State Court). 18 How., opinion, 516.

Messenger vs. Mason involved a statute, but it did not appear whether it involved a statute of the State or the Territory of Iowa. Because the certificate of the Court, and the record in the case, were silent on this vital point, and it did appear that a statute of the Territory was involved, the Court held there was nothing to show any statute except a statute of the Territory involved. A few words will show that this was the point there.

"One difficulty in bringing the case within this 25th section is, "that it makes no provision for the re-examination of a judgment "in a State Court *which upholds the validity of a statute of a Territory* "in contravention of the Constitution. * * * * The circum- "stance, therefore, that the Court below held the statute of the "Territory providing for partition of lands among tenants in com- "mon, valid, is of no importance in the case." (Opinion, p. 510.)

Clearly, there is a difference between the general claim of constitutional protection, which appears in an answer, and the more carefully worded assignments of error, or certificate, that shall

specify what it is that the United States Supreme Court is desired to review.

If my assignments of error in this case are too indefinite or general, the case just cited would apply and my writ of error would be dismissed, but this claim is not made in the brief served upon us. But we contend that this Court itself has recognized in the broadest way the general proposition that if it appears in any way fairly that the constitutionality of a specific statute has been drawn in question, and the protection of the Constitution of the United States has been claimed and has been denied by the State Courts, then upon proper assignments of error and a proper writ of error this Court will take jurisdiction and review. If this Court will not do so the Constitution of the United States will have little force or virtue in those sections of this country wherein lawyers and laymen alike are quite unacquainted with any artificial rules of practice, and where, therefore, they follow the codes of practice of their States and claim the protection of the Constitution of the United States by pleadings or by exceptions in the broadest possible manner.

In this case, under the law and practice of New York, if the answer of the Erie Railroad Company was too indefinite, the Courts were not at liberty to disregard it on the trial, but the remedy of the party was to have it made more definite and certain before the trial. In such cases the Courts assume that the failure to have it made more definite and certain is due to the fact that the party who had that right clearly understood what was claimed and was willing to go to trial and meet the broad claim made.

Greenfield vs. Insurance Co., 47 *N. Y.*, 430; *opinion, pp.* 436-437.

The learned Court below seems to have overlooked the consideration that these actions were brought for penalties upon statutes which are pleaded by chapter, as is provided by the Code of New York, and are, therefore, to be regarded as if set forth in the complaint word for word. Being so pleaded in the complaint, the answer must be read with reference to the complaint. This is not the first time that the Courts of New York State have overlooked so elementary a consideration in a case of my own. In a case where the question of whether the answer should be read in connection with the complaint was up, Finch, J., speaking for the Court of Appeals, said :

"This answer must be read in connection with the allegations "of the complaint."

Douglas vs. Haberstro, 88 *N. Y.*, 611; *opinion, pp.* 618.

The Court of Appeals in New York is frequently compelled to reverse, because the lower Courts have lost sight of the pleadings in disposing of the case.

In a recent case it was said:

"Statements, admissions and *allegations* in pleadings are always "in evidence for all the purposes of the trial of the action."

Holmes vs. Jones, 121 *N. Y.*, 461, 466.

Is it not apparent that the application of these principles to this case is that on the trial the Court could not shut its eyes to the claim of unconstitutionality under the United States Constitution made in the answer of the Erie Railroad Company?

Counsel for the Erie Railroad Company moving to dismiss "upon the ground that the complaint in each of the actions fails to "state facts sufficient to constitute a cause of action for a penalty," what point of law could have been urged in support of this motion if not the unconstitutionality of the statutes as pleaded by answer?

With the claim of unconstitutionality made in the answer of the Railroad Company before the Court, how could the Court understand this motion to really raise any other question except the question of the validity of the statutes in question? Could the Court understand the claim to be anything else than a claim that the statutes were invalid because they were unconstitutional? (Record, p. 65, fol. 134.)

It might have been better had some part of the argument in support of this motion appeared. Suppose, however, no argument was made, for the reason that the lower Courts of New York had already determined the statutes in question to be constitutional. Suppose that counsel for the Erie Railroad Company well knew that the Trial Term of the Supreme Court, and also the Appellate Division of the Supreme Court, had already determined these questions adversely to the claim of the Railroad Company, and, therefore, aside from raising the questions by a proper motion and exception, it would be useless to talk about them to an intelligent Court. In the brief for defendant in error, it is pointed out that this was the situation of affairs when this case was tried and when it was argued in the Ap-

pellate Division, and, therefore, it is suggested that the question was not argued until it reached the Court of Appeals.

It is true the question was not argued until it reached the Court of Appeals, but let it be remembered always that the question was raised and the claim was made in various ways that the statute was unconstitutional.

The motion for a nonsuit at the end of the case, on the ground that the cause of action alleged had not been proved, and no cause of action had been proved, necessarily raises the question of whether or not the statutes in question are valid or invalid, constitutional or unconstitutional, if that motion is to be referred back to the answer and the claim of the Railroad Company in the answer. (Record, p. 102, fol. 207.)

It matters not that a specific point was made that the legislation was unconstitutional because of the interstate commerce clause in the United States Constitution, because such a claim would not be a waiver of the broader claim made in the Railroad Company's answer and asserted in the broad motions which were expressly intended to reach and did reach the question of Purdy's right to recover at all.

In addition to this, when Purdy's counsel asked the Court to direct a verdict, and the Court did so, granting an exception to the Railroad Company, which it ordered heard with the others in the Appellate Division in the first instance (p. 104, fol. 211), the Court put the Railroad Company in the position of challenging the right of the plaintiff to recover a penalty upon any and every ground that might defeat his action. One of those grounds, and the very first one of those grounds, was the unconstitutionality of the statutes involved. And in our brief in the Appellate Division we said:

"The Court ruled that the legislation of this State was intended "to and did apply to the defendant, and did not violate the Consti- "tution of the United States, in which respect the Court supposed it "followed the other rulings to which we have referred, but the "defendant took its exception for use hereafter. The point not "decided in the other cases, but here presented for the first time, is "that this point is well taken *upon the facts now before this Court.*" (Brief for Railroad Company in Appellate Division, pp. 7-8.)

Of course that brief is not before this Court, nor does the practice of the State of New York provide for its becoming a part of the record for the consideration of this Court, but the point is that

under the exceptions taken at the trial this was a proper point to make in the Appellate Division and a proper point to make in the Court of Appeals. That this is so understood in the State of New York by the ablest Judges is seen in the opinion of Comstock, J., in *Belknap vs. Sealey*, 14 *N. Y.*, 143; opinion, 148, where that learned Judge says:

"But if the exception so made is general, as it was in this case, "I think it only raises the question whether upon the facts as found "*the law has been properly decided*, and that it does not present for "the consideration of an Appellate Court a special objection on the "ground of variance between the complaint or answer and the "proof."

This is particularly true of those cases in which the question raised is one of law alone, and, therefore, one which could not be altered or saved by evidence at the trial. Here, no possible evidence can be suggested that would have saved the statutes in question if they were claimed to be unconstitutional by answer, motion or exception.

This rule has been recently applied by the Court of Appeals in *Gerding vs. Haskin*, 141 *N. Y.*, 514, 521, where it is said:

"But where no grounds are specified for a nonsuit, the motion is "sufficient if it be apparent that the objection made to the plain- "tiff's recovery could not have been obviated if it had been par- "ticularly specified."

The brief for the defendant in error treats this question as one to be determined by the decisions and practice of the State Courts of New York. If it is to be so determined, the very case cited in the opinion of the learned Court in this case is an authority in favor of our position.

Speaking of a case where the unconstitutionality of the statute was not suggested by demurrer, answer, or by a motion to dismiss, or to nonsuit, or by an exception or a motion for a new trial on exceptions, the Court said:

"There was a motion for a re-argument of the case of *Brook-* "*man v. Hamill* (46 *N. Y.*, 636). The Court denied the motion, "and, in denying it, said: 'This case differs from that of *Vose v.* "*Cockcroft* (44 *N. Y.*, 415), upon which the appellant founds his "motion for re-argument. In that case *the objection that the com-* "*plaint showed no cause of action* was not taken either at Special or

"General Term, and the judgment was affirmed at General Term. "*In the present case the objection was taken at General Term, and the* "*judgment was there reversed.*"

Opinion *Delaney vs. Brett*, 51 *N. Y.*, pp. 82, 83.

Had the learned Court not overlooked this important principle of law, or its application to this case on the record presented, we think it would not even have suggested a "doubt" as to the constitutional question having been sufficiently raised in the Courts below. Certainly there is no evidence that the railroad company waived the constitutional claim it made in the very first answer it filed in these cases, and in every answer filed afterwards. On the contrary, the record is only consistent with that claim being vigorously asserted from first to last in the Court of Appeals. Having been vigorously asserted in the Court of Appeals, on a record putting in question Purdy's right of recovery on grounds broad enough to involve the validity of the statutes upon which he stands as the basis of his cause of action, we find the Court of Appeals writing an opinion of many pages on the merits, and determining that question adversely to us. Having so determined it, it then proceeds to "doubt" if the question has been raised on the strength of an authority that on examination proves to be an authority in favor of the proposition that it was sufficiently raised.

Is such a mere "doubt" sufficient to deprive this Court of jurisdiction after the Court of Appeals has considered and passed upon the merits of the constitutional question brought here for review and further consideration? Is the question a question to be determined solely from the standpoint of the decisions of the State of New York, or is it a Federal question?

THIS IS A FEDERAL QUESTION.

Recent decisions of this Court enable us to answer this question positively in favor of the plaintiff in error. This Court has recently held:

"But the question whether a right or privilege, claimed under "Constitution or laws of the United States, was distinctly and suffi- "ciently pleaded and brought to the notice of a State Court, *is itself* "*a Federal question*, in the decision of which this Court, on writ of

"error, is not concluded by the view taken by the highest Court of "the State. *Neal v. Delaware*, 103 *U. S.*, 370, 396, 397; *Mitchell v. "Clark*, 110 *U. S.*, 633, 645; *Boyd v. Thayer*, 143 *U. S.*, 135, 180.")

Quoted from opinion Gray J., in *Carter v. Texas*, 177, *U. S.* 442, 447.

This, too was said of a case where the only claim to the protection of the Constitution of the United States was in these words:

"That such discrimination is a denial to him of the equal "protection of the laws, and of his civil rights guaranteed by the "Constitution and laws of the United States." (P. 444.)

Clearly, after the Court of Appeals had discussed this question on the merits and determined it against the defendant in error, it should not now be held that it was not sufficiently raised for such discussion, because that Court closed the discussion by suggesting a mere "doubt" as to the question being then up which it discussed and determined.

This is the view of this Court as we understand it, for in the most recent case we can find on the subject it is said:

"In regard to the objection that even Carhart has raised the "question too late, we think it is without foundation. He raised it "in the Supreme Court, and that Court decided it against him, not "on the ground that he had not raised it in the lower Court, but on "its merits, and for the reason that in the judgment of the Supreme "Court the statute was a valid and constitutional exercise of the "legislative powers of the State."

Sully vs. American National Bank, 178, *U. S.*, 289; *opinion, Peckham, J.*, 298.

And these late cases in this Court do no more than to recognize the rule applied in its earlier decisions. Those decisions have always treated the constitutional question as raised if an inspection of either pleadings, instructions, or any other part of the record, showed any objection broad enough to fairly disclose to the Court that the legislation was claimed to be unconstitutional under the United States Constitution. As I understand the decisions of this Court, they hold it is enough if either of three things appear by the record.

1. That the protction of the Constitution was *claimed* in the pleading; or,

2. That the protection of the Constitution was invoked by a motion for a non-suit, or some other appropriate motion, or by an exception to the direction of a verdict, or an instruction of the Court; or,

3. That some statute or proceeding was involved, and the citizen denied its binding force upon him, but the court held against him, thus in effect determining that the statute was constitutional, when upon its face it appeared to be unconstitutional, although the record fails to show the Constitution was mentioned in pleadings on the trial, or until after the judgment was rendered.

These propositions rest upon the assumption that all courts are presumed to know and to apply the Constitution in accordance with the very oath taken by every judge of every state and national court.

In *Bridge Proprietors vs. Hoboken*, 1 *Wall*, 116 Miller, J., said:

"It is objected, however, * * * that the pleadings do not "in words * * * * point out the *special clause of the Constitu-* "*tion* supposed to render the act invalid. It would be a new rule in "pleading and altogether superfluous, to require a party to set out "specially the provision of the Constitution of the United States on "which he relies for the action of the Court in the protection of his "rights. If the courts of this country, and especially this Court, "can be supposed to take judicial notice of anything without plead- "ing it specially, it is the Constitution of the United States."

The same able Judge, speaking for this Court in the leading case of *Murdock vs. Memphis*, 87 *U. S.*, 590, said:

"It has been many times decided by this Court * * * "that if it appears from the record that the plaintiff in error raised "and presented to the Court, by *pleadings*, prayer for instruction, *or* "*other appropriate method*, one of the questions * * and the "Court ruled against him, the jurisdiction of this Court attached, "and we must hear the case on the merits."

The defendant in error recognizes this case as a leading case.

In *Kaukauna Co. vs. Green Bay, etc., Canal Co.*, 142 *U. S.*, 254, proceedings were taken in a State Court under a State statute enacted before the adoption of the Fourteenth Amendment to the United States Constitution, and those proceedings, after the Fourteenth Amendment took effect, being upheld against the corporation, it insisted that such decision denied it its constitutional rights, and

sued out a writ of error to review the decision of the State Court. Its pleadings were not drawn with a view to the case going to this Court, and, therefore, the pleadings did not specifically raise the constitutional question, nor did the record clearly show that it was raised, except that the decision itself was necessarily adverse to the constitutional rights of the corporation. In its opinion this Court said (p. 269):

"Notwithstanding the inhibition of the Constitution *is not dis-*
"*tinctly put in issue by the pleadings, nor directly passed upon in the*
"*opinion of the Court*, it is evident that the Court could not have
"reached a conclusion adverse to the defendant company without
"holding, either that none of its property had been taken, or that
"it was not entitled to compensation therefor, which is equivalent
"to saying that it had not been deprived of its property without
"due process of law. *This Court has had frequent occasion to hold that*
"*it is not always necessary that the federal question should appear affirm-*
"*atively on the record, or in the opinion, if an adjudication of such*
"*question were necessarily involved in the disposition of the case by the*
"*State Court.* (*Willson vs. Blackbird Creek Marsh Co.*, 2 *Pet.*, 245;
"*Armstrong vs. Athens County*, 16 *Pet.*, 281; *Chicago Life Insurance*
"*Co. vs. Needles*, 113 *U. S.*, 574; *Eureka Lake Co. vs. Yuba County*,
"116 *U. S.*, 410.")

In *Meyer vs. Richmond*, 172 *U. S.*, 82, the claim that the charter and ordinances involved were unconstitutional was first made on a motion to set aside a judgment. As this claim was not made until after the judgment was rendered, and, therefore, could not have been made in the pleadings in the case, it was insisted that this Court could not review the decision of the Court of Appeals of Virginia, because the unconstitutionality of such charter or ordinances had not been brought in question by the pleadings, or by anything done on the trial of the action. In passing on this claim this Court said (p. 91):

"The jurisdiction of this Court is challenged. The defendants
"in error claim that 'the declaration shows no point is therein
"raised which demanded the consideration by the Court of any
"constitutional question,' and they insist further that 'if it were in-
"tended to raise the question that the charter and ordinance were
"unconstitutional, and in consequence thereof plaintiff was de-
"prived of his property without due process of law, the same should

"have been specially set up as claimed by apt language *in the* "*declaration*, so as to bring the question to the attention of the Court "when it had to pass on the demurrer.' This certainly was not "done, and *if* it was an indispensable condition to the jurisdiction "of this Court it has none.

"But it was done subsequently, as we have stated, and, what- "ever the ground of the Court's ruling on the demurrer and on the "first motion to reverse that ruling, the second motion was un- "equivocally based on the invalidity of the city ordinance because "of its asserted conflict with the Fourteenth Amendment of the Con- "stitution of the United States, and the Court's ruling necessarily "responded to and opposed the grounds of the motion—neces- "sarily denied the right specially set up by him under the Consti- "tution."

In *Chicago, R. & I., etc., R'y vs. Sturm*, 174 *U. S.*, 710, the action was brought against a railroad employee in a justice's court in Kansas. A continuance was asked because judgment had gone against the defendant in Iowa under a garnishee and that case was pending in Iowa on appeal. The continuance was denied and the Kansas court also rendered judgment against the defendant. A new trial was moved for, and on that motion the claim was first made that the Constitution of the United States required that full faith and credit be given to the Iowa judgment. The motion for a new trial was denied there as it was denied in this case by the Appellate Division. The Court of Appeals of Kansas affirmed that judgment. On writ of error this Court assumed that the question was sufficiently raised. This Court said of the defendant's attempts to get a continuance, and, later, to get a new trial (p. 718):

"The plaintiff in error did all it could and submited only to "the demands of the law."

The plaintiff in error is not estopped from urging the Constitution as a defence to these penal actions.

This follows from what has been said. The State and its courts have no interest in raising such an estoppel for defendant in error. The State and its courts have not been misled by plaintiff in error. Plaintiff in error has not deprived them of their rights. It has complied with all valid laws of the State. Valid laws of the State entitle the Erie Railroad Company to its full fare from every passenger. Those laws conflict with the special law Purdy seeks to

enforce. That special statute is unconstitutional. The Erie Railroad Company did not mislead Purdy but in over twenty different answers the Erie Railroad Company set up and "insisted" upon this claim as a defense. Where, then, is the conduct of the plaintiff in error upon which defendant in error can predicate an estoppel? It is not in the answers, the trial, the motions, the exceptions, the motion for a new trial, or the appeal. This claim of unconstitutionality runs through them all. Is it in the certificate of incorporation? That might help the State if it were a party to this action if it clearly showed an intent to waive all objections to this illegal special statute. But it shows no such intent. And the State is not a party here, is not interested in this suit. But the State and its courts are bound to uphold the United States Constitution, the "supreme law" of our land. The State is asked to do that by the plaintiff in error as a defense to a void act. Can the State or its courts refuse to do it? Should they enforce such void act contrary to the supreme law urged as a defense? Can they say the defendant in error can estop them from doing it? Can Purdy estop the Erie Railroad Company from asserting this defense? What consideration has the Erie Railroad Company ever received from Purdy for waiving this defense? It is said such an estoppel "never takes "place when one party did not intend to mislead and the other is not actually misled." (*Anderson's Law Dict.* "*Estoppel*," and authorities there cited.) Where then is the basis for an estoppel in favor of defendant in error? If the penal statute is invalid and void because it is unconstitutional within the United States Constitution as is held in *Beardsley vs. The New York, Lake Erie & Western R. R. Co.*, and *Lake Shore, etc., vs. Smith* 173 *U. S.*, 684, there is no evidence that the Erie Railroad Company has ever intentionally waived its right to have such statute pronounced unconstitutional and void as to the Erie Railroad Company. The evidence of such a "surrender" or waiver should be nothing less than some document or act that can bear no other construction. This case is clearly distinguishable from cases where the State reserves to itself a certain portion of the income of a corporation as a condition of granting such corporation some right, privilege or franchise. In those cases the State itself creates the corporation for a consideration and the courts of the State properly uphold the right of the State to that consideration. They estop the corporation from withholding it. Here the State is not involved. It has no interest in estopping the Erie Railroad

Company from asserting a constitutional defense to Purdy's action. By filing a certificate of incorporation the Erie Railroad Company cannot be held to have assented to the legislation in question, whereby certain favored individuals are permitted to withhold from the Erie Railroad Company what all others are legally obligated to pay the Erie Railroad Company under like circumstances, because the State is in no way benefited by such confiscation of the income of the Erie Railroad Company for the sole benefit of such favored individuals without due process of law, within either the State or United States Constitution.

This is a penal action affecting corporations of public character and public interest, and it will be unjust to railroad corporations competing with each other to hold that acts of the legislature which the legislature has no power to pass, and is prohibited from passing by both State and United States Constitutions, are, nevertheless, enforceable by estoppel as against all corporations organized after its passage. The Erie Railroad Company contends that such a rule of law is not warranted by authority, and should not be established, because it will deny the "equal protection of the laws" to all corporations, contrary to the provisions of the Fourteenth Amendment of the United States Constitution.

The authorities and the quotations made from them very clearly show that it is enough that the record in this case shows that the Erie Railroad Company did claim that the act in question was unconstitutional, by the very first pleading filed. That pleading shows that that claim was not confined to any one provision of the Constitution, but that it was made as broad as the "various" provisions of the Constitutions of the State of New York and of the United States. The record shows nothing to show that that claim was ever waived, or limited, but so far as it shows anything, it shows that that claim was insisted upon at the trial and upon the motion for a new trial on exceptions at the Appellate Division. That particular stress was laid on the interstate provision in the answer, and Courts would not limit the Erie Railroad Company thereto when it asserted the broader claim, too, as it did.

The record shows that this claim that the act was unconstitutional was necessarily determined against the Erie Railroad Company by each of the Courts in which it was made. The rules of the Supreme Court of the United States now provide that it may read the opinion of the Court of Appeals of the State of New York to see

whether the question was raised in that Court. It clearly appears from the opinion of that Court, and its simple affirmance of the decisions of the Courts below, that that Court affirmed their decisions knowing that it was denying the Erie Railroad Company its constitutional rights, which it had claimed from the beginning by its answer. It clearly appears that the Erie Railroad Company is denied the equal protection of the laws by the opinion handed down in that Court in the Beardsley case. We think, too, it clearly appears by the opinion in the Beardsley case and in this case that the opinion of this Court in the Smith case was not approved of by the Court of Appeals of the State of New York, but was followed by compulsion when followed at all.

With these facts clearly presented, it must be apparent that the Erie Railroad Company has claimed the protection of the United States Constitution, and has been denied the protection of that Constitution by the decisions rendered in this case.

Counsel for the Erie Railroad Company would not put in the answer they did after the Beardsley case was decided and then waive the very defense thus pleaded for "use hereafter," to quote our brief in the Appellate Division. Purdy's counsel defied that claim by himself moving for the direction of a verdict and obtaining the direction of a verdict. He took that directed verdict despite Erie Railroad Company's pleaded and established defense and the exception to the direction of that verdict. The Erie Railroad Company challenged that direction and Purdy's right to any verdict by a motion for a new trial, on the exception to such direction. What the Erie Railroad Company said at the Appellate Division is unimportant, but it clearly appears that the Erie Railroad Company there claimed that the act was unconstitutional under the United States Constitution and that its exception was intended to and did preserve that question for review. That claim was set forth in specific, clear language, which we have quoted, and which again notified Purdy that he had to meet and defeat that claim. The Appellate Division ignored this claim of the Erie Railroad Company, and thereupon it was again set forth with elaboration, and re-enforced with the decision in the Smith case. Thereupon, the Court of Appeals of the State of New York said (reluctantly) that it would follow the Smith decision in the Beardsley case, but that it would not follow it in this case for reasons given. Those reasons, aside from a "doubt," are reasons dealing wholly with the right of the Erie

Railroad Company to avail itself of its claim that the act in question is unconstitutional. That opinion is summed up in the one word "estopped." The constitutions and the general laws were overlooked or the Erie Railroad Company would not be considered "estopped" by a special statute in conflict with them. Plaintiff in error has the right to urge the "higher law" as its defense in this action. Plaintiff in error has urged that defense from the beginning by answer, and motion, and appeal. It still urges that defense. After reflection, I am clear that the reasons assigned for denying the Erie Railroad Company the protection of the Constitution of the United States are not tenable. Down to the present time they lack the support of any authority. The opinions handed down by the New York Courts rest upon the repealed, the "annihilated," the "blotted out" Statute of 1895. They cannot rest on that foundation.

THE CORPORATION RIGHTS.

I should have had printed in the record the certificate of incorporation and the deeds that were in evidence in the Trial Court had I supposed the claim made, and sustained by the Court of Appeals, would ever be made in any court.

But consideration shows the apparent immateriality of all that evidence upon this issue. What would it show? The certificate of incorporation under Chapter 688 of the Laws of 1892, Sections 3 and 4, would simply show a new corporation organized November 14, 1895, to acquire "all the rights, privileges and franchises which at "the time of such sale belonged to or were vested in the corporation last owning the property sold, or its receiver." The new corporation, however, is expressly required to be "subject to all the "provisions, duties and liabilities imposed by law on such corporations."

N. Y. Stock Corporation Law, Section 3, *subdv.* 4, *Chap.* 688, *Laws of* 1892, pp. 1825–6.

The deeds to the new corporation convey the property to it, and its certificate of incorporation gives it the corporate rights of any corporation formed at that time. Would the corporation have any other corporate rights than those acquired by some other corporation formed at that time? Apparently it would not have any other corporate rights. Apparently it would have such property

rights called "franchises" as were attached to the property conveyed to it. For instance, the railway and terminal facilities acquired by it in New York or Buffalo might carry with them, as an incident thereto, certain rights and franchises in the streets or public places of those cities. But would it have the corporate rights or powers of the old corporations that preceded it divorced from rights thus attached to property the old corporations had owned? In other words, would the soul, so to speak, of the old corporation pass into the new corporation, and would the new corporation be a continuation of the old corporation? If so, the new corporation could question the constitutionality of the Act of 1895. Apparently this question has been already answered adversely to the Erie Railroad Company.

In Metz vs. B. C. & P. R. R. Co., 58 *N. Y.*, 61, Grover, J., said of such a case (p. 66):

"Indeed, were this so, the property purchased would be liable "to all the existing debts of the corporation, and thus the mortgage "security, and the rights of the purchaser, might be entirely de-"feated. I think it clear that the *corporation* did not vest in the "purchasers, and that they did not become stockholders or corpora-"tors in the *pre-existing* corporation."

In *People ex. rel. Schurz vs. Cook*, 110 *N. Y.* 443. Peckham, J., said (p. 449):

"We think it is also plain that under the reorganization acts "above mentioned, when the purchasers at the foreclosure sale "undertook to reorganize under those acts, and for that purpose to "file in the Secretary's office a certificate upon the filing of which "they become a body politic and corporate, *the corporation thus "formed is a new and entirely different one* from that whose property "and franchises the purchasers may have bought under the fore-"closure proceedings. * * * The right to be a corporation "which the old corporation had was not mortgaged, and was not "sold, and did not pass to the purchasers."

In *Covington, etc., Turnpike Co., vs. Sandford*, 164 *U. S.*, 578, Harlan, J., giving the reasons for a unanimous reversal of the Court of Appeals of Kentucky, quoted with approval from previous decisions of that Court which hold (p. 587):

"In the absence of express statutory direction, or of an equiva-"lent implication by necessary construction, provisions in restriction

"of the right of the State to tax the property *or to regulate the affairs* "*of its corporations*, do not pass to new corporations succeeding by "consolidation or by purchase under foreclosure to the property and "ordinary franchises of the first grantee. * * * The same princi- "ples should be recognized when the claim is of immunity or exemp- "tion from legislative control of tolls to be exacted by a corporation "established by authority of law for the construction of a public "highway. It is of the highest importance that such control should "remain with the State, and it should never be implied that the "legislative department intended to surrender it."

So here, it should not be implied that the plaintiff in error intended to surrender its constitutional right. So here, it should not be implied that the plaintiff in error intended to surrender its right to a full fare from each passenger under general laws that are constitutional, and to yield one-third of such fare to each passenger who would force the plaintiff in error to sell tickets wholesale under the unconstitutional statutes in question.

If the principles laid down in the cases to which we have referred are to be applied to the Erie Railroad Company, apparently it can never escape from the decision made in the opinion handed down by the Court of Appeals of the State of New York. Apparently, for all time all Courts of the State of New York will enforce this unconstitutional statute against the Erie Railroad Company or make it pay penalties thereunder to persons like the defendant in error, the constitution, general statutes and decisions to the contrary notwithstanding.

AUTHORITIES CITED BY DEFENDANT IN ERROR ON QUESTION OF JURISDICTION.

Nor do the cases cited by defendant in error require a different conclusion, or lay down a different rule. He cites *Dewey vs. Des Moines*, 173 *U. S.*, 193, and *Keokuk & H. B. Co. vs. Illinois*, 175 *U. S.*, 626, as conclusive on this question.

In the Dewey case, Peckham, J., said:

"Parties are not confined here to the same arguments which "were advanced in the Courts below upon a Federal question there "discussed. Having, however, raised only one Federal question in

"the Court below, can a party come into this Court from a State "Court and argue the question thus raised, *and also another not con-* "*nected with it*, and which was not raised in any of the Courts below, "*and does not necessarily arise on the record*, although an inspection "of the record shows the existence of facts upon which the question "might have been raised? * * * In such case, if the Court be- "low denied the right claimed, it would be enough; or if it did not "in terms deny such right, *if the necessary effect of its judgment was to* "*deny it, then it would be enough.* But the denial, whether expressed "or implied, must be of some right or claim founded upon the "Constitution or the laws or treaties of the United States which had "in some manner been brought to the attention of the Court below. "*The record shows nothing of the kind in this case.*" (Opinion, pp. 198, 200.)

Further comment is unnecessary, because we here seek the application of the principles recognized in this opinion.

In the Keokuk case, Chief J. Fuller said:

"Although no particular form of words is necessary to be used "in order that the Federal question may be said to be involved, "within the meaning of the cases on this subject, there yet must be "something in the case before the State Court which at least would "call its attention to the Federal question as one that was relied on "by the party, and then, if the decision of the Court, while not "noticing the question, was such *that the judgment was by its necessary* "*effect a denial of the right claimed or referred to, it would be sufficient.*" (Opinion, p. 634.)

Of the numerous cases cited by defendant in error on this point, the remainder are easily shown to be without application here. Some are like *Morrison vs. Watson*, 154 *U. S.*, 111, where it is said that the constitutional question was "never raised." Some are like *Chappell vs. Bradshaw*, 128 *U. S.*, 132, and *Miller vs. State*, 153 *U. S.*, 535, where the constitutional question was never raised until a motion for a re-argument was made in the highest Court of the State.

Some are like *Walker vs. Sauvinet*, 92 *U. S.*, 90, where the constitutionality of an Act under the State Constitution was held not subject to review by the United States Supreme Court.

Some are like *Brown vs. Commonwealth*, 141 *U. S.*, 573, a criminal case in which no claim was made under the United States Constitution in any way, shape or manner, until after the prisoner had

been tried and convicted, and then it was too late to claim that the Court that convicted him had denied his constitutional rights to him, when he had not even claimed them.

Without going more into detail, it is enough to say that all these cases concede that in some manner the protection of the United States Constitution must be claimed by the defeated party, but they all concede that it is enough if that claim is fairly made by pleading, motion, exception, or in any other appropriate form. And they all stand upon the principle, also, that if the Court below passed upon the constitutional question on the merits, it cannot be urged in this Court that the constitutional question was not raised so as to entitle it to be passed upon upon its merits.

III.

The Erie Railroad Company is entitled to succeed on the merits of the questions brought here for review by the writ of error.

We might well risk this point on the facts and the decision in *Lake Shore vs. Smith*, 173 *U. S.*, 684. If this Court cares to go further, however, we will further examine this question on the merits.

(a) *The Court below overlooked important decisions and facts in holding "all" of the changes wrought by the Act of* 1896, *"are more favorable to the railroad company;" and the Court conceded if this was not so the Erie Railroad Company was entitled to succeed.*

This appears from the opinion in which it is said:

"The statute of 1896 was passed subsequently to the incorpora-
"tion of the defendant, and if the statute increased the burden
"imposed on the defendant by the Act of 1895, as to such additional
"burden it would be invalid. But a comparison of the two acts
"shows that *all* the modifications of the statute of 1895 effected by
"the statute of 1896 are favorable to the railroad company."

Here follows an analysis of the Act of 1896 as compared with the Act of 1895, intended to show that the Act of 1896 is more favorable to the railroad company. The analysis made strikes a railroad lawyer with astonishment, if he is familiar with the successful efforts of the Commercial Travelers' Association, to replace

the statute of 1895 with that of 1896. Railroad opposition did not prevent the change. The history of the populistic moves of Gov. Pingree of Michigan, over these mileage acts and litigations is also instructive on this point. (34 Am. L. R., 39 to 41.) This struggle over this change shows the interested parties knew which would be favored by the proposed change.

1. The features added in 1896 were not "all" "favorable" to the railroad. The Act of 1895 required mileage books to "issue," but there was no provision in the Act of 1895 requiring the Erie Railroad Company to keep such books for sale at any particular ticket office. By the Act of 1896, however, they were required to be "kept for sale by such corporation at every ticket office of such corporation in an incorporated village or city."

But for this specific language, if the railroad corporation had issued mileage books and had kept them for sale in its great offices in the great cities, it might well have urged that it should not be subject to a penalty for not keeping such valuable books for sale at every small branch office in a city, or every office in the smallest incorporated village, where there would be no demand therefor.

2. The Act of 1895 did not provide where application should be made for such a book, or how soon after application therefor the railroad should be required to provide it. Therefore the railroad could very well have claimed the traveling public must make application for these valuable books a reasonable length of time beforehand, to enable it to procure them from headquarters, where they were kept.

But by the Act of 1896 any construction of this kind was prevented, by requiring that in "every ticket office" the mileage book "shall be issued *immediately* upon application therefor."

This case is a very apt illustration of the importance of this provision, because Purdy's right of action immediately accrued day by day, because the Erie Railroad Company was required to issue the mileage book to Purdy "immediately."

3. Again, within all the decisions of the courts, the railroad companies certainly had the right to insist that the holder of a mileage book, under the statute of 1895, should use it up in a "continuous" trip.

Hill vs. S. B. & N. Y. R. R. Co., 63 *N. Y.*, 101.

Auerbach vs. N. Y. C. & H. R. R. R. Co., 89 *N. Y.*, 281, 284.

This right was left unimpaired by the Act of 1895, which only gave the "holder" the right "to travel 1,000 miles on the line or "lines of such railroad."

This right of the railroad company was a very valuable one, and this right alone would have prevented local passengers from buying mileage books for short trips from place to place. If mileage books could only be used for a "continuous" trip, but few would be sold. Whether the "holder" of such a book could assign it or not was, therefore, unimportant, because the railroads could make such books practically worthless by requiring the "holder" to use it up in a "continuous" trip or find his remainder of the book worthless.

Under the Act of 1896, this right was taken away from the railroad company, and provision was made instead by which the mileage book should have "one thousand coupons attached "thereto. * * * The holder of any such mileage book shall "be entitled upon surrendering at any ticket office on the line or "lines of such railroad, coupons equal in number to the number of "miles which he or any member of his family or firm, or a sales-"man of such firm, wishes to travel on the line or lines of such "railroad, to a mileage exchange ticket therefor."

By this language it was first made possible for any person making numerous short trips to buy such a mileage book and use it for such short trips.

4. The Act of 1895 makes no provisions as to the rights of the holder of such mileage book, except that he may "travel one "thousand miles on the line or lines of such railroad."

If the corporation saw fit to require such a traveler to travel by some particular train, or in some particular car, as is done with the holders of excursion or other cheap tickets, there is nothing in the act denying the right of the corporation so to do.

Nolan vs. N. Y., N. H. and H. R. Co., 41 *N. Y., Sup'r Ct.*, 541.

So, too, the words "good this date only" would have compelled the holder to use it at once.

Elmore vs. Sand, 54 *N. Y.*, 512.

In the Act of 1896 these points are covered, and it is further provided:

"Such mileage exchange ticket shall entitle the holder thereof "* * * to the same rights and privileges in respect to transpor-

"tation of person and property to which the highest class ticket "issued by such corporation would entitle him."

The highest class ticket issued by such corporation would entitle him to travel over the lines of the Erie Railroad Company in any of the States through which it passes. The highest class tickets permit "stop-overs." Under this act the traveler could buy a mileage book in New York City and immediately exchange it for an exchange ticket for one thousand miles, upon which he would be entitled to travel to Chicago, stopping by the way, if the act is construed according to its precise requirements, because the highest class ticket issued by such corporation would entitle him to travel to Chicago or anywhere on the Erie Railroad Company's lines. Or he could get any number of short exchange tickets, one at a time, for his coupons, until he used them all up, no matter how many years that took, or how many different exchange tickets.

5. There is nothing in the Act of 1895 in any way preventing the Railroad Company from stating a reasonable limit of time within which such mileage books should be good. Therefore the Railroad might insist that travel over its lines "was to be continuous after it was commenced."

Hamilton vs. N. Y. C. R. R. Co. 51 *N. Y.*, 100, 104.

If the holder of such a mileage book got off and afterwards undertook to continue his trip on another train, he could be compelled to pay his fare.

The Courts go further and permit the Railroad to limit time within which its ticket shall be good, in the absence of a statute to the contrary.

Hill vs. S., B. & N. Y. R. R. Co., 63 *N. Y.*, 101.

They can compel the passenger to use the ticket the same day.

Elmore vs. Sands, 54 *N. Y.*, 512.

On such a ticket "the plaintiff was bound to a continuous "passage over the defendant's road; that is, the plaintiff could not "enter one train of the defendant's cars, and then leave it and "subsequently take another train and complete his journey."

Auerbach vs. N. Y. C. & H. R. R. R. Co., 89 *N. Y.*, 281, 284.

But the Act of 1896, makes this provision to prevent such a rule from applying:

"Such mileage books shall be good until all coupons attached "thereto have been used."

Such books are thus made good forever. The Railroad Company is compelled to make any number of contracts good forever. The rise in prices now going on might bankrupt the road in time were it compelled to make and have out enough such contracts. It might find it impossible to meet such contracts at Dewey excursions and penalties might ruin it if a small road. Without the addition of this burden the act would not be so clearly unconstitutional. In the case of *Smith vs. Lake Shore* the decision turned in part on the requirements that the book should be good for "two years."

This provision is certainly more onerous than anything contained in the Act of 1895. I think the Court below must have overlooked this provision, and many of these considerations, in reaching the conclusion that "all" the modifications of the Act of 1896 "are favorable to the Railroad Company." It follows that the Act of 1896 is unconstitutional.

(b) *The Act of* 1895 *was "blotted out and annihilated" by the Act of* 1896; *therefore the Act of* 1895 *cannot sustain this judgment.*

The opinion of the Court below assumes that the Act of 1895 and the Act of 1896 can be treated as if the Act of 1895 continued in force after the Act of 1896 was enacted. The Court thus overlooked the legal principle that the later act incorporates and merges into it every single provision of the Act of 1895, and adds thereto the important provisions, among others, to which we have called attention. For the purpose of making this apparent at a glance, I here print the two acts side by side, italicizing the Act of 1896 as to all additional words found in it.

CHAPTER 1027.

AN ACT IN RELATION TO THE ISSUE OF MILEAGE BOOKS BY RAILROAD CORPORATIONS.

Became a Law June 15, 1895, with the approval of the Governor. Passed, three-fifths being present.

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

SECTION 1. Every railroad corporation operating a railroad in this State, the line or lines of which are more than one hundred miles in length, and which is authorized by law to charge a maximum fare of more than two cents per mile and not more than

CHAPTER 835.

AN ACT TO AMEND CHAPTER TEN HUNDRED AND TWENTY-SEVEN OF THE LAWS OF EIGHTEEN HUNDRED AND NINETY-FIVE, ENTITLED, AN ACT IN RELATION TO THE ISSUE OF MILEAGE BOOKS BY RAILROAD CORPORATIONS.

Became a Law May 22, 1896, with the approval of the Governor. Passed, three-fifths being present.

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Section one of chapter ten hundred and twenty-seven of the laws of eighteen hundred and ninety-five is hereby amended so as to read as follows:

three cents per mile, shall issue mileage books entitling the holder thereof to travel one thousand miles on the line or lines of such railroad, for which the corporation may charge a sum not to exceed two cents per mile. Any railroad corporation which shall refuse to issue a mileage book as provided by this section, or in violation thereof, to accept such mileage book for transportation, shall forfeit fifty dollars, to be recovered by the party to which such refusal is made; but no action can be maintained therefor unless commenced within one year after the cause of action accrued.

SEC. 2. This act will take effect immediately.

SECTION 1. Every railroad corporation operating a railroad in this State the line or lines of which are more than one hundred miles in length, and which is authorized by law to charge a maximum fare of more than two cents per mile, and not more than three cents per mile, *and which does charge a maximum fare of more than two cents per mile,* shall issue mileage books *having one thousand coupons attached thereto,* entitling the holder thereof, *upon complying with the conditions hereof,* to travel one thousand miles on the line or lines of such railroad for which the corporation may charge a sum not to exceed two cents per mile. *Such mileage books shall be kept for sale by such corporation at every ticket office of such corporation in an incorporated village or city, and shall be issued immediately upon application therefor. The holder of any such mileage book shall be entitled, upon surrendering, at any ticket office on the line or lines of such railroad, coupons equal in number to the number of miles which he or any member of his family or firm, or a salesman of such firm, wishes to travel on the line or lines of such railroad, to a mileage exchange ticket therefor. Such mileage exchange ticket shall entitle the holder thereof without producing the mileage book upon which such exchange ticket was issued, to the same rights and privileges in respect to the transportation of person and property to which the highest class ticket issued by such corporation would entitle him. Such mileage books shall be good until all coupons attached thereto have been used.* Any railroad corporation which shall refuse to issue a mileage book as provided by this section, or, in violation hereof, to accept such mileage book for transportation, shall forfeit fifty dollars, to be recovered by the party to which such refusal is made; but no action can be maintained therefor unless commenced within one year after the cause of action accrues.

SEC. 2. This act shall take effect immediately.

See how heavy are the additions made by the last italicised words. Are they "all" changes "more favorable to the Railroad "Company?" If not, the Court below admitted we were entitled to succeed in our defense.

It is very clear that the later act absorbs and wipes out the earlier act, which is thus merged into it, and therefore there is no authority except the later act under which Purdy can maintain this action against the Erie Railroad Company. Purdy so understood the matter. He does not bring any of his actions under the Act of 1895. His causes of action did not accrue until after the Act of 1896 was the only law on the subject. Every demand he made for a mileage book from June 26, 1896, down was a written demand "under Chapter 1027 of the Laws of 1895 *as amended* by "Chapter 835 of the Laws of 1896." (P. 147, fol. 586.)

In the brief of Purdy's able counsel in the Court of Appeals he said:

"In the ten causes of action upon which this recovery was had, "plaintiff had made his demands for mileage books upon the "defendant June 26, 1896; June 29, 1896; July 1, 1896; July 3, "1896; July 10, 1896; August 12, 1896; August 15, 1896; August "22, 1896, and August 27, 1896." (Pp. 2 and 3.)

It will thus be seen that every recovery in this case was a recovery of a penalty for the violation of the Statutes of New York as they stood after the Act of 1896 took effect. The cause of action therefore arose under that statute, the demand for the mileage book was made under that statute, and the action was brought under that statute. Under such circumstances, if the statute of 1895 is merged in the statute of 1896, the statute of 1896 is the only statute that could be enforced. The statute shows clearly that the Legislature intended the Act of 1896 to absorb the Act of 1895, so that the Act of 1896 would be the only statute of the State on the subject. The Act of 1896 is a "substitute" for the Act of 1895. Under such circumstances, the principles applied in litigations involving the construction of statutes should be applied here.

In *Matter of N. Y. Institution*, 121 *N. Y.*, 234, Earl, J., says (pp. 239, 241):

"*There are decisions holding that where prior laws are revised and "consolidated into a new act, such act is to be deemed to contain the entire "law upon the subject, and that a prior provision of law which is dropped*

"*is to be regarded as repealed.* In *Ellis vs. Paige* (1 *Pick.*, 43), it is "said: 'It is a well-settled rule that when any statute is revised, "or one act formed from another, some parts being omitted, the "parts omitted are not to be revived by construction, but to be con- "sidered as annulled. To hold otherwise would be to impute to "the Legislature gross carelessness or ignorance, which is altogether "inadmissible.' In *Bartlett vs. King* (12 *Mass.*, 537), it was held "that a subsequent statute revising the whole subject matter of a "former one, and evidently intended as a substitute for it, although "it contains no express words to that effect, must, upon principles "of law, as well as in reason and common sense, operate to repeal "the former.' * * * * * * * *

"In *Butler vs. Russell* (3 *Cliff.*, 251), Mr. Justice Clifford said: "'When a revising statute covers the whole subject matter of ante- "cedent statutes, the revising statute virtually repeals the former "enactments without any express provision to that effect, and even "when some parts of the revised statute are omitted in the new "law they are not in general to be regarded as left in operation, "but are to be considered as annulled, if it appear plainly that the "intention of the Legislature was to cover the whole subject "matter by the revising statute.' In *Patterson vs. Tatum* (3 *Sawyer*, "164), Mr. Justice Field said: 'The proposition of counsel that a "statute is impliedly repealed by a subsequent act revising the "whole matter of the first is undoubtedly correct.' *In re South-* "*worth* (5 *Hun*, 55), it was held that where a statute is revised, and "parts of the former statute omitted from the statute revising it, the "part so omitted cannot be revived by construction.

"Against the construction contended for by the petitioner, the "the general rule may also be invoked, that where two statutes re- "late to the same subject matter, though not in terms repugnant "and inconsistant, if the latter one is plainly intended to prescribe "the only rule that shall govern, it will repeal the earlier one "(*Davicss vs. Fairbairn*, 3 *How.* (*U. S.*) 636; *Morris vs. Crocker*, 13 *Id.*, "429; *King vs. Cornell*, 106 *U. S.*, 395; *Heckmann vs. Pinkney*, 81 *N.* "*Y.*, 211; *People vs. Gold & Stock Tel. Co.*, 98 *Id.*, 67; *People vs.* "*Jachne*, 103 *Id.*, 182, 193.)

"Some of the authorities cited go so far as to hold that where "prior statutes are revised or consolidated into one act, any part of "the prior statutes omitted must be deemed to have been repealed,

"although the matter omitted is in no way provided for in the new "law. But we need not go so far in this case. Here Section 8 of "the Act of 1865 contained provisions for the assessment and pay- "ment of the expenses of improving streets, and complete pro- "visions upon the same subject, somewhat dissimilar however, are "contained in the Consolidation Act, and hence they must be "deemed, under all the decisions, *to take the place of the prior pro- "visions, and to furnish the only rule upon the subject.*"

In *People vs. Wilmerding*, 136 *N. Y.*, 363, the State undertook to collect duties upon the sales of imported articles by an auctioneer, and the defendant, the auctioneer, claimed that the act which imposed the duties had been "repealed"; also that it was "unconstitutional."

In that case, as in this, the act involved commenced as follows:

"Section 1. Section 1 of Chapter 62 of the Laws of 1846, is "hereby amended so as to read as follows:

The act being so amended, the statutory question was whether duties could be recovered under the old act, or whether no duties could be recovered except under the later act. Upon this point Peckham, J., said (pp. 368, 372 and 374):

"It is a general rule that where a statute repealing an earlier "statute is itself repealed, the earlier statute comes in force upon "such last repeal. (*Van Denburgh vs. Greenbush*, 66 *N. Y.*, 1.) "There is also another rule well established in this Court, which "declares that a statute declaring a former statute to be thereby "amended so as to read as prescribed in the amending act, is not a "repeal of the original statute, and that from the time of the "passage of the amendatory act, such act is the only enactment on the "subject as to future transactions, and the former statute is merged "and lost in, and has no vitality distinct from, the amendatory act. "And it has been held that a repeal of the amendatory act does not "revive the original act, but both fall by virtue of the repeal of the "latter act. (*People vs. Supervisors*, 67 *N. Y.*, 109.)

* * * * * * * * * * *

"The whole argument does not, as it seems to me, give due and "proper weight to the principle which has been so plainly and so "recently decided by this Court in the case of *People vs. Supervisors*, "above cited.

"It was there distinctly decided that an earlier statute which "was amended and re-enacted in the shape of an amendment, so

"as to read as prescribed in the later amendatory statute, was "thereby wholly annul'ed *as to all future cases and became merged* "*and incorporated into the later statute.*"

* * * * * * * *

"It thus appears that the enactment of the later statute of 1866, "by reason of the language used in the first section thereof, did "thereby incorporate into it all the life and force of the first section "of the Act of 1846, *so that the later act stood from that time and as to* "*all future cases as the sole and only exponent of legislative intent and* "*power upon the subject and such act thereby utterly blotted out and anni-* "*hilated the earlier statute, except as to rights or duties already existing.*"

* * * * * * * *

"There is nothing in the case of *Matter of Rochester Water Com-* "*missioners*, 66 *N. Y.*, 415, which is at all inconsistent with the "views herein expressed. * * * * * In the Rochester case "the later statute which amended Section 23 of the earlier statute "'so as to read as follows,' did in truth enact an entirely new "section, leaving wholly out of it the original twenty-third section "of the earlier act. From a perusal of the two acts and the powers "granted therein the Court felt sure that the legislature by amending "the twenty-third section of the earlier act in the manner stated in "the later one, did not intend to repeal the earlier twenty-third "section, and in truth did intend to incorporate its text into the "amended section so that it should all read as one section, and thus "the original section was to be continued in force."

* * * * * * * *

"Having thus, by the amendment of 1866, accomplished the *total* "*annihilation of the first section of the Act of* 1846, *as to all matters* "*subsequently arising*, the case is then brought within the principle "of that of *People vs. Supervisors* (*supra*), and hence a mere repeal "of the Act of 1866, without some language equivalent to an "enactment, could not revive the absolutely dead provision of the "first section of the Act of 1846."

* * * * * * * *

"The case at bar also plainly differs from that of *In re Estate of* "*Prime* (*ante, p.* 347), decided at this term. In that case the later "act re-enacted the provisions of the former act, although not in "identical language. It was argued by the appellants that the later

"act repealed by implication the former one, and that rights which "had already accrued under the former one could neither be "enforced under it because of its implied repeal, nor under the "later act, because its provisions were prospective only. This "highly technical and refined reasoning was not sustained by the "Court."

This case involves a penal statute. Said Bartlett J., in *Quinlan vs. Welch*, 141 *N. Y.*, 164:

"The repeal of a penal statute discharges offenses committed "before such repeal and proceedings based thereon. (1 *Hale's Pleas* "*of the Crown*, 291; *Lartung vs. People*, 22 *N. Y.*, 99, 100; *Curtis* "*vs. Leavitt*, 15 *N. Y.*, 229; *Butler vs. Palmer*, 1 *Hill*, 324.) This "statute of 1873, *being in no sense penal*, it falls within the rule that "has long existed, and was recognized by this Court in *Matter of* "*Miller*, 110 *N. Y.*, 216."

The last point made by defendant in error takes up this point. He cites the Prime case, 138 N. Y., 347, and the Warde case, 154 N. Y., 342, to show that the Act of 1895 is still in force. We have shown the New York Courts do not so understand the Prime case. The Warde case, too, admits the force of the principle for which we contend. It is there said: "There was once, and long ago, a rule "in the construction of statutes, that an amendment of it was to be "regarded as if having been incorporated in and made a part of "the original enactment, *but that rule has for a long time been disre-* "*garded* and it is now settled that an amendment has no more "retroactive effect than an original act on the same subject." Opinion Haight, J., quoting with approval from *Ely vs. Halton*, 15 *N. Y.*, 595. See 154 *N. Y.*, 344.

Other N. Y. cases in addition to those I have heretofore cited might be cited to show the Statute of 1895 is "blotted out."

Pratt vs. Munson, 84 *N. Y.*, 582, *opinion* 585.
People vs. Upson, 79 *Hun*, 87-89; *aff'd* 147 *N. Y.*, 716.
McDermott vs. Nassau El. R. R. Co., 85 *Hun*, 422; *aff'd*, 147 *N. Y.*, 700.

Had this action been brought under the Act of 1895 for acts done before the Act of 1896 took effect, the Statutory Construction Act might save it but such is not the case. That act is to the same effect as the cases cited. Otherwise it does not touch this point. It provides "the repeal of a statute which amends a provision of a prior

"statute, leaves such provision in force *unless the amendatory statute "be a substantial re-enactment of the statute amended.*" Chap. 677, Laws 1892, Sec. 31.

The same rule has long been followed in the United States Supreme Court. In *U. S. vs. Tynen*, 11 *Wall.*, opinion 92, Field, J., said:

"Where there are two acts on the same subject the rule is to "give effect to both if possible. But if the two are repugnant in "any way of their provisions, the latter act, without any repealing "clause, operates to the extent of the repugnancy as a repeal of the "first; and even when two acts are not in express terms repugnant, "yet if the latter act *covers the whole subject of the first, and embraces "new provisions, plainly showing it was intended as a substitute for the "first act, it will operate as a repeal of that act.*" (Citing numerous cases.) See also *U. S. vs. Claflin*, 97 *U. S.*, 546.

Upon these authorities comment is unnecessary. They lay down the plain rule that when an entire act is so amended as to read "as follows," the later act is the only existing law on the subject, and the prior act is "annihilated," and cannot be made the basis upon which to recover penalties in this action.

This action, then, must rest upon the statute of 1896, which annihilated the Act of 1895. The statute of 1896 is unconstitutional, for the Court has so held it in the Beardsley case. Plaintiff in error may raise the point that it is unconstitutional, because the Court so holds in this case. As the Act of 1896 is unconstitutional and is the only support for this action, and the Erie Railrod Company can raise this objection against it, it follows that that objection must prevail and the judgment in this action cannot stand.

If these actions had been brought under the Act of 1895 for offences arising before the Act of 1896 took effect, the Statutory Construction Act might save them. But Purdy did not demand a book until June, 1896. The Act of 1896 had then become the only existing statute on the subject. Purdy made his demand under Act of 1896. He brought his actions under that act.

Therefore the above cases apply, and the Statutory Construction Act does not touch this question.

(c) *The Erie Railroad Company has not waived or surrendered its right to insist that this act is unconstitutional as a defense to Purdy's penal action based on a statute that is utterly "void."*

The Court says: "We know of no reason why a railroad company may not *agree* upon a sufficient *consideration* to *surrender* or *transfer* any specific pecuniary right." Grant this and where is the evidence that the Erie Railroad Company has agreed, contracted to surrender or transfer its constitutional right to one-third its own income for a "consideration"? The record shows nothing of the kind. Can such an important fact be assumed because we filed a certificate of incorporation November 14, 1895? The filing of such a certificate is not a waiver or "surrender" of our constitutional right to one-third our income from our own property. The "surrender" of so important a right should not be implied in the absence of evidence. The constitution gave us the right to all our income; *and general statutes of the State then fixed the maximum amount thereof.* When we were incorporated we accepted them. We never *accepted* the Mileage Act.

It was not a condition of the incorporation of defendant that it should accept the Mileage Book Act of 1895. There is nothing in the Mileage Book Act of 1895 justifying such a conclusion. We have shown these actions are all based upon the Act of 1896, which has "blotted out" the Act of 1895. The Act of 1896 is alone a live, complete and enforceable statute. These actions rest upon it. There is nothing in any statute of the State of New York, or any decision of the State of New York down to this case sustaining the judgment herein.

Purdy's counsel in the New York Court of Appeals contended:

"The Mileage Book Act of 1895 was in force at the time this "defendant had the breath of life breathed into it by its certificate "of incorporation November 14, 1895. * * * Having accepted "a charter granted it by the State, and the statute then being in "force requiring the issuance of mileage books, such statute "became as much a part of its charter as if it had been expressly "recited in its certificate of incorporation that it should issue mile-"age books, and having accepted the benefits of the franchise, it is "*estopped* from denying the right to impose conditions upon it." (Pp. 21 and 22.)

This case then rests upon the proposition that the Erie Railroad Company is "estopped" from urging the unconstitutionality of a penal statute as a *defense* thereto. Are the courts also "estopped" and under compulsion to enforce an unconstitutional law? Do

any cases so hold? Purdy's industrious counsel cites a number of cases to sustain his contention. Do those cases sustain it? According to his own statement of *Bushwick vs. Ebbets*, 3 *Edward's Ch.*, 353, in his brief in the Court of Appeals, that case is one where:

"The complainants were incorporated under a special act of the "Legislature. * * * The Court said: 'The complainants vol- "untarily accepted the charter *with that provision in it*, and are "bound by all it contains.'"

In other words, if the Legislature had passed a special act incorporating the Erie Railroad Company, and the Mileage Book Act had been a provision thereof, the Erie Railroad Company could not have accepted its charter without accepting such mileage book provision. But in this case there is no pretense, in the case or elsewhere, that the Mileage Book Act is made any part of any statute under which the Erie Railroad Company was incorporated. The Mileage Book Act has nothing to do with incorporating corporations. Consequently, the Railroad Company could incorporate under any act of the State permitting its incorporation, without either accepting or rejecting the Mileage Book Act. It was not called on to accept or reject the Mileage Book Act. No lawyer would claim that the lawyer who incorporated the Erie Railroad Company thereby advised it to take a position which "estopped" it from questioning the Mileage Book Act. On the contrary, when the Erie Railroad Company was incorporated, it had breathed into it the Constitution of the United States and the Constitution of the State of New York. The Constitution of the United States and the Constitution of the State of New York became a part of its charter. The general law giving it the right to full fare from all passengers became part of its charter. If the Mileage Book Act conflicted with this general law about fares and the Constitution of the State of New York, or the Constitution of the United States, it had to give way to them. The constitutions of state and nation are older than the Mileage Book Act. No legislature of the State of New York had the right or power to violate the constitution by passing that act. By filing a certificate of incorporation, the Erie Railroad Company did not yield the right to take this position. It did not in any way bind itself to yield one-third of its income to a certain favored class, in violation of both state and national constitution. The case does not disclose one word or one act of the Erie Railroad Company evidencing its intent to waive or surrender its rights under the

constitution. There is nothing in the case, or in the fact that it was incorporated, which warrants any holding that it intended to and did waive its right to assert that the constitution is the supreme law of the land and a statute enacted in violation of it is a mere nullity. And furthermore, the only law in force now is the Act of 1896, passed subsequent to the incorporation of the Erie Railroad Company.

Every one of the cases cited for defendant in error are where the law was valid or where the corporation did some act under the law clearly showing an acceptance of its provisions which afterwards estopped the corporation from questioning the validity of the statute thus accepted.

In *Philadelphia vs. Pennsylvania*, 52 *Pa. St.*, 451, the corporation was a municipal corporation. As such, it was a creature of express legislative enactment. If the city saw fit to accept a charter containing an unconstitutional provision, the city could not very well assert the unconstitutionality of such provision as against the State. The Court therefore said:

"With what grace, then, can they object to the constitutional "power of the Commonwealth to prescribe the conditions to which "they have *voluntarily assented*, and by virtue of which they enjoy "franchises * * * * It is enough for the occasion to say that "a municipal corporation which has so recently accepted a charter "*subject to this well known statute*, is not in position to raise a doubt "about its constitutionality."

In *Owens vs. St. L. & S. Ry. Co.*, 83 *Mo.*, 454, the defendant claimed that it was independent of the Constitution of the State and of the Statutes of the State under which it was created and came into being, and subject to which it took its charter. Of this claim that the corporation, created under the Constitution and Statutes of the State, was "independent of both," the Court said:

"It strikes me that the refutation of the proposition is found in "the statement."

In *Mayor vs. Broadway*, 17 *Hun*, 242, the condition on which the defendant was permitted to run its cars in the city was that it should pay certain license fees. Of course under such circumstances the Court said:

"The defendant *accepted its charter* with this burden, and of "course cannot be heard to object that it was or is illegal."

In *Nolensville vs. Quinby*, 28 *Tenn.*, 476, the proceeding was to assess damages "as prescribed by the Act of Incorporation." The plaintiff claimed the proceeding was unconstitutional. The Court of course said:

"Certainly the company have no right to complain, for the "charter, *with the provision in it*, was tendered to them and they "subscribed the stock, and organized the company, with a full "knowledge of the privileges and liabilities created."

In *C. C. & A. Ry. Co. vs. Gibbs*, 24 *S. C.*, 60, the whole matter appears in a single sentence:

"It may be that the general law of 1879 cannot be considered "as an amendment of the charter of the plaintiff, for the very con- "clusive reason that it was in existence at the time the charter was "granted; but, it seems to us, it was more than an amendment— "*it was a part of the charter itself*, or at least one of the conditions upon "which the charter was granted and accepted."

In *Alabama & V. R. R. Co. vs. Odeneal*, 73 *Miss.*, 34, the whole matter is again stated by a sentence:

"The Act of March 13, 1884, relative to farm crossings was then "in force and was therefore *integrated into this charter upon organiza-* "*tion*, and under said laws, as a part thereof; and appellant has "therefore no standing to question the constitutionality of the "legislative provisions touching such crossings."

In *McCandless vs. R. & D. Ry. Co.*, 38 *S. C.*, 103, the whole matter again appears in a sentence:

"So, when the State of South Carolina *made a contract by the grant* "*to this railroad company*, all of her laws in existence at that time "pertaining thereto became a part of such contract."

Again, in *People vs. Quigg*, 59 *N. Y.*, 89, the whole matter appears in a sentence:

"The law permitting judgment to be perfected upon the recog- "nizances upon default in the condition, was in force at the time "*recognizances were entered into and made a part of the terms and condi-* "*tions of the undertaking and covenant of the parties*, as much as if in- "serted in the instrument."

The Court undoubtedly saw that all of these cases were cases in which the charter was granted, or the license, grant or undertaking was made under such conditions that some condition, some burden,

was made a part of the very charter, contract, license, grant, or covenant, in such sense that the defendant was conclusively shown to have accepted the charter, contract, license or covenant, subject to its burdens. Having so accepted a charter, a license, or having so entered into a contract, covenant or undertaking, the defendant of course could not retain the benefits thereof and still undertake to repudiate the very burden "integrated" into the charter, license, contract or covenant.

But the Court below cited three cases in its opinion, which we will also examine.

In *Railroad Company vs. Maryland*, 21 *Wall.*, 456, there was a special charter granted by act of the Legislature, a provision of which was that the railroad company should pay the State "one-fifth of the whole amount which may be received for the transportation of passengers."

The question was whether the railroad company that accepted this charter, built its road under it, and paid the money under it for many years, could afterwards claim that this charter was unconstitutional. The Court did not hold that the railroad company was estopped from questioning the constitutionality of the law. On the contrary, in the highest court in Maryland, and in this Court, the railroad company was permitted to raise and discuss the question of the constitutionality of this act. The language quoted from that opinion in the opinion in this case is language used by Bradley, J., to show that the State was entitled to succeed on the merits of the controversy. In substance, the position of the Court was that the amount required could be exacted by the State as a consideration for creating the railroad company and giving it the powers granted to it. This appears from a sentence:

"It has a right to exact compensation for their use."

This was put upon the ground that the whole charter was a mere *contract*, because when the State had proposed it and the corporation had accepted it, it could be nothing else than a contract. This Court said (p. 468):

"The company was simply under a *contract* to pay the State one-
"fifth of the whole amount received for the transportation of pas-
"sengers. If there was anything unconstitutional in the arrange-
"ment it was in this *contract*."

Here, however, we are asked to go a long step in advance, and to hold that the Erie Railroad Company has waived the right to one-third of its own income from its own passengers, although it has never made any contract or accepted any charter by which it entered into such an agreement. We are to hold this too, where the *general statutes of the State* give the Erie Railroad Company the right to full fares from all and both constitutions uphold that right.

In *Ashley vs. Ryan*, 153 *U. S.*, 436, the State of Ohio required railroad corporations filing articles of incorporation in that State, as a condition thereof, should pay a fee or tax therefor equal to one-tenth of the par value of the entire stock of the consolidated corporation. Fifty-two thousand dollars was there paid "under protest," and a suit was brought to recover back all of it except $700, on the ground that the Constitution of Ohio and of the United States was violated by thus placing a burden on interstate commerce. This Court did not hold that the corporation was estopped from raising or debating the question, but it held that the State had the power to require the payment of this amount of money as a fee or tax, in consideration for which it would grant the corporation such privileges and franchises as it would acquire by filing its certificate and becoming a corporation of the State of Ohio.

In *Louisville & Nashville Ry. Co. vs. Kentucky*, 161 *U. S.*, 677, the question was whether the State of Kentucky could enjoin various railroad companies from acquiring various other railroad companies or from selling out to or operating their competitors, contrary to the statute of the State forbidding them so to do.

This Court did not hold that the corporations were estopped from raising the constitutional question in that case. On the contrary, it discussed that question and passed upon it on the merits. It said:

"While the constitutional power of the State in this particular "has never been formally passed upon by this Court, the power of "State legislatures to impose this restriction upon the general "authority to consolidate, has been recognized in a number of "cases." (P. 703.)

Could this or any other Court safely lay down such a doctrine as a reason for enforcing an unconstitutional penal statute where its unconstitutionality is set up and claimed as a defense?

The cases may all be summed up in three general classes:

1. Those in which the provision attempted to be questioned is a part of the charter, contract, covenant, or other instrument, by which the corporation receives its life, upon condition that it shall observe and perform the very provision which it afterwards undertakes to question.

2. Those in which the legislature requires the payment of a part of its income, or a percentage on its capital stock, as a fee or tax, in consideration for which it shall receive its corporate life.

3. Those in which the legislature exercises the power of self preservation, the police power of the State, in the interests of its citizens, by providing that competing railroad companies shall not consolidate.

I submit that this case does not come within any of these cases. Nor does this case come fairly within anything said in any of these cases. If this case is to be determined against the Erie Railroad Company it must be determined against the Erie Railroad Company upon some principle not yet determined by this Court, so far as I can find after a diligent examination of the reported decisions and the text-books of writers of authority.

Undoubtedly the Erie Railroad Company could waive its right to part or all of its income from passengers. No act is referred to as indicating such waiver, except the act of the Erie Railroad Company in filing a certificate of incorporation under the laws of this State November 14, 1895. It is not claimed that there is any express enactment or provision of law which required the Erie Railroad Company to waive its objections to the constitutionality of the legislation in question. The claim necessarily is a claim that it has waived its objection thereto by implication. I submit that no authority is cited, or can be cited, that will uphold such an extraordinary doctrine. Surely, the Courts are not to fritter away our Constitutions by implying a waiver of all unconstitutional laws in existence at the time of the birth of a corporation or an individual. A corporation or an individual does come into being under the Constitution and laws of a State or Nation, subject thereto. Such corporation or individual is bound to obey such Constitution and laws. But no Court has yet held that either a citizen or a corporation must yield constitutional guaranties and obey unconstitutional statutes that happen to be on paper at the time

of the birth of the citizen or the corporation. Here general laws also entitled us to our full income. They were valid. They could not be repealed by an unconstitutional law. They were not in form repealed by it. We had a right to stand on the valid general laws.

This case all comes back to this. Purdy's attorney says that the Erie Railroad Company had breathed into its charter an unconstitutional statute, a special statute, which thereby became a part of that charter, thus estopping the Erie Railroad Company from ever claiming the contrary. I claim that the Constitutions and general laws were breathed into the charter of the Erie Railroad Company at the time of its birth, and that that Constitution not only authorized but required the Erie Railroad Company to yield obedience to it as the supreme law of the land, even though thereby a penal statute that was already a nullity should be afterwards so declared by the decree of the Courts sworn to support the Constitution. If the constitutions and general statutes conflict with the special statute, the special statute must give way. This position is a perfect defense to an attempt to collect illegal penalties under an unconstitutional statute. We made this claim in our answer at once, never waived it, ever asserted it, and yet we were denied our constitutional rights.

(d) *The constitutionality of the act under the Interstate Commerce clause was clearly raised, and, as the judgment rendered requires the Erie Railroad Company to issue* 1,000 *mile books that can be exchanged for exchange tickets at any time, giving the holder thereof the rights and privileges that a first-class passenger has and good over the "line or lines" of its railroad, it follows the judgment necessarily affects Interstate commerce.*

The demands made and the Act of 1896 are an argument in support of this point. Had Purdy got the books demanded he would have had a contract good for ever, entitling him to first-class exchange tickets, good over the "line or lines" of railroad anywhere. The judgment holds he could compel us to give him such a book (contract), entitling him to such first-class tickets at any time for 1,000 miles over our "line or lines." Is this constitutional?

SUMMARY.

In this hastily dictated brief more attention has been given to precedent on points more nearly germane to the motion made to dismiss or affirm than has been given to the real merits of the case. The far-reaching import of questions of the character of those involved in this action is being weighed by those who understand the incumbrance which special privileges and unequal laws have ever proved to be in all nations. France before the Revolution presented a striking illustration of the pernicious character of such unequal laws and privileges, and after the Revolution, in spite of its many excesses, the more just distribution of property brought about by laws based upon the principle of equality has worked a corresponding contentment and happiness to the nation as a whole.

Our Constitutions, both State and National, undertake to guarantee every citizen from despotic inequalities in the laws. Our Constitutions try to guarantee to every citizen the equal protection of the laws as to life, liberty and property. When citizens band together and form corporations that become artificial citizens according to law, they, too, become entitled, as representing aggregations of property, to all constitutional provisions intended to protect property. No property long remains valuable, is "property," if it fails to produce income. The Erie Railroad Company is not a company paying large dividends on its stocks; in fact, its stocks are nearly worthless and have been for many years, because it is unable to pay any dividends whatever upon them.

In New York State, where this litigation arose, the difficult character of the country through which the Erie railroad runs and its comparatively sparse settlement, have caused the Legislature to permit it to charge three cents a mile, where the New York Central can only charge two cents a mile for passengers. Afterwards, at the behest of a particular class of wealthy merchants, or traveling men, or commercial interests, the Legislature passed a law to compel nearly all railroads, except the New York Central, in effect to give them one-third of their income if they would buy tickets wholesale; in other words, thousand mile tickets. The general law fixing a three cent fare was not repealed, the Constitution was not amended, but the Legislature boldly adopted class legislation in the interests of the well-to-do instead of the poor. We argued that legislation was not intended to apply to an inter-state railroad like the Erie, that

winds in and out over the State border; that it only applied to railroads of New York alone, but the Courts of New York held otherwise, and we understand their construction of the act on this point is not reviewable here.

In *Lake Shore vs. Smith*, 173 *U. S.*, 684, this Court condemned such class legislation. When that decision was brought to the attention of the Court of Appeals of New York, it said "yes," but it doubted its correctness and it thought it could find a way to estop the Erie Railroad Company from saying anything about the law of New York being unconstitutional. There was no pretense that the *litigant* had ever furnished any consideration on which to rest an estoppel, or that there was any reason as between him and the Erie Railroad Company why *he* should be able to estop the Erie Railroad Company from asserting its constitutional right and its legal right to its own income. There was no suggestion that the State had ever given a consideration to the Erie Railroad Company for intentionally waiving its constitutional right. Without evidence of waiver, except the fact that the Erie Railroad Company was born after the first act was passed, the Court held the Erie Railroad Company estopped from questioning the unconstitutionality of that act.

But it now appears that the Erie Railroad Company was born before the only act that is living or enforceable was passed. It appears that that subsequent Act of 1896 is much more onerous to the Erie Railroad Company than was the one of 1895. It appears that these actions were brought and the demands on which they rest were made under the Act of 1896.

It appears that the Act of 1896 has absorbed the Act of 1895 so completely that it has been "blotted out" and "annihilated" by the Act of 1896.

Nevertheless, overlooking these considerations, and the cases that justify them, the Court of Appeals proceeds to pronounce judgment against the Erie Railroad Company, by which judgment it compels the Erie Railroad Company to obey an unconstitutional and invalid law. It compels the Erie Railroad Company to enter into contracts with a favored class that are good forever, that are not even limited to its lines in the State of New York, but are sufficient evidence upon which to compel it to issue exchange tickets good upon its lines anywhere.

Furthermore, the Act goes beyond the Act of 1895, and for the

first time gives the holders of these tickets all the rights and privileges of first-class passengers who pay full fare.

The necessary effect of this judgment then is that it gives the Act of the Legislature of the State of New York an extra-territorial effect over all the lines of the Erie Railroad Company, and it enforces that admittedly unconstitutional Act, although it is subsequent in date to the incorporation of the Erie Railroad Company.

If such a decision is sustained, we have the anomaly of the United States Supreme Court declaring such statutes unconstitutional, and State Courts enforcing them. We shall soon have special privileges by which old corporations and new corporations may escape the operation of the same law designed for such corporations. The Constitution will be valid as the supreme law of the land as to some interstate commerce, and will be invalid as to other interstate commerce upon the same lines of railroad. Whether the Constitution will be effective or not will depend upon how much money the man had, and how large a ticket he bought, and not upon any other consideration except the age of the corporation.

From such a jumble, which would soon exceed anything France, or any other country, ever knew, it must be that there is some plain method of escape. That plain method of escape must be the enforcement of the Constitution of the United States in all States. All railroad corporations must be treated as equals in this respect. All persons bringing actions like these must be told that they are not in a position to urge the principle of estoppel against corporations either young or old. The principle of estoppel as against the enforcement of constitutional provisions, *even those protecting property*, must be confined to cases like those wherein the State, in consideration for granting special privileges to corporations expressly stipulates in return that the corporation shall pay the franchise tax, or a share of its tolls, or some other consideration. If a corporation sees fit to come into existence upon such conditions, it cannot complain if it is compelled to live up to them. But there is not a syllable of evidence in this record that the Erie Railroad Company occupies any such position, even as to the State of New York; *and it does not, as a matter of fact or law.* There is no evidence of waiver of our Constitutional rights. If there was as to the Act of 1895 it would not avail against the Act of 1896 under which these actions are brought, and which is alone enforcable.

And when we come back to this action, as between the parties

to it, there is no reason in this case anyway why the supreme law of the land should not be the law of this case, or why any Court in the State of New York should exercise its ingenuity to find a way to enforce a statute which it admits the highest Court in this or any other country has already condemned as a violation of the Constitution of the United States, and, therefore, as a statute invalid anywhere in any State.

I respectfully submit that instead of the writ of error being dismissed, or of an affirmance, that it is very apparent there should be a reversal of the judgments of the Courts of the State of New York with proper instructions to them.

ADELBERT MOOT,

Counsel for Plaintiff in Error,

BUFFALO, N. Y.